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**From:** Matsumoto, Kimi [Matsumoto.Kimi@epa.gov]  
**Sent:** 11/21/2018 3:08:50 PM  
**To:** Matsumoto, Kimi [Matsumoto.Kimi@epa.gov]  
**Subject:** FW: Summary of latest ASLB Order in DB  
**Attachments:** E181030t010629\_Powertech 103018mo.pdf

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**From:** Chin, Lucita  
**Sent:** Wednesday, November 14, 2018 2:55 PM  
**To:** Shea, Valois <Shea.Valois@epa.gov>; Minter, Douglas <Minter.Douglas@epa.gov>; Bahrman, Sarah <Bahrman.Sarah@epa.gov>  
**Cc:** Boydston, Michael <Boydston.Michael@epa.gov>; Logan, Paul <Logan.Paul@epa.gov>; Matsumoto, Kimi <Matsumoto.Kimi@epa.gov>; Sutin, Elyana <Sutin.Elyana@epa.gov>  
**Subject:** Summary of latest ASLB Order in DB

As you may recall, the NRC and the OST were in the midst of negotiations regarding a cultural survey earlier this year. There was a plan to have 2 two-week surveys during the summer. However, those plans ended abruptly after the Tribe provided a proposal for the survey in June because the NRC staff, after reviewing the proposal, determined they were too far apart. Following that, the parties submitted Motions for Summary Disposition to the Board. The Board issued an Order on Oct 30, 2018 that addressed those Motions.

The Order held the following:

1. The NRC has still not fulfilled its hard look obligation under NEPA, and there is a material factual dispute as to the reasonableness of the NRC's implementation of the March 2018 approach. Therefore, summary disposition is not appropriate.
    - a. NRC did not use their contractor to negotiate a detailed survey plan
    - b. NRC did not communicate with elders and identify cultural resources with them
    - c. NRC did not go onto the land with OST to document sites and identify mitigation.
    - d. There is no new information about sites before the Board
  2. There are 2 issues of material fact:
    - a. Reasonableness of survey method
    - b. Reasonableness of NRC deciding to discontinue work
  3. Further Procedures to resolve contention 1A – two avenues:
    - a. Option 1: NRC can resume implementation of the March 2018 approach, with appropriate adjustments to dates
- i. The only aspect open for negotiation is the site-survey methodology (i.e. – the specific scientific method that would fit into the 2 two-week periods set out in the March 2018 approach, or how the contractor and Tribal members will walk the site)
- b. Option 2: Parties can prepare for prompt evidentiary hearing. The 3 issues of material fact that must be addressed before 1A will be ripe for resolution by summary disposition are:
    - i. NRC staff must show the March 18 approach contained a reasonable methodology for the conduct of the site survey
    - ii. NRC staff must show that the decision to discontinue work completely was reasonable
    - iii. Consistent with 40 CFR 1502.22, the NRC must show the proposed tribal alternative would be cost prohibitive. (*With respect to the cost prohibitive factual dispute, the NRC Staff must provide information establishing the 40 C.F.R. § 1502.22(b)(3) and (4) requirements that set forth a "summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts [of the Dewey-Burdock project] on the human environment,"*<sup>258</sup> and *"the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community."*<sup>259</sup> In other words, in these circumstances, if the NRC Staff concludes there is no affordable alternative to the open-site survey for assessing the missing Native American cultural resources, to satisfy NEPA, the NRC Staff must at a minimum provide a sufficiently detailed explanation addressing the cultural

*resources analysis for the Oglala Sioux Tribe and the other Native American tribes that is currently missing from the FSEIS.260)*

The NRC staff needs to notify the Board by Nov. 30 of their decision. If they choose to proceed with the hearing, it is scheduled for February 26-28. The Board expects a decision by June 1, 2019.

Let me know if you have any questions.

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